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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. 584

EDWARD LEWIS SHORT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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for the Ninth Circuit.

Edward Lewis Short, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 2, 1959.

OPINION BELOW.

The District Court did not render an opinion. The opinion of the Court of Appeals (Appendix) is reported at 270 F. 2d .....

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 2, 1959, and affirmed the judgment of the District Court for the District of Alaska, First Division, which judgment was entered December 12, 1957. Under the judgment of the District Court, the defendant, found guilty of bribery after a trial by a jury, had been sentenced to five years of imprisonment, four and one-half of which were suspended with the provision that the suspended period be spent on probation.

A timely petition for rehearing was denied by the Court of Appeals on November 13, 1959. The Court of Appeals has stayed its mandate pending the filing and consideration of this petition for writ of certiorari.

Jurisdiction of this court is invoked under the provisions of 28 U.S.C. 1254 (1), this petition for certiorari being filed within the time prescribed by Rule 38 of this court pursuant to 18 U.S.C. 3772.

QUESTIONS PRESENTED.

1. Whether petitioner was deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States, by virtue of the refusal of the trial court to dismiss the indictment for failure to endorse the names of the witnesses appearing before the grand jury thereon.

2. Whether the decision of the United States Court of Appeals for the Ninth Circuit refusing to reverse

petitioner's conviction has vitiated the statutes of the State of Alaska mandatorily requiring that the names of witnesses be endorsed on all indictments.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provision involved is the Fifth Amendment:

". . ., nor be deprived of life, liberty, or property, without due process of law; . . .".

The statutes involved are Section 66-8-52, ACLA 1949:

> "That when an indictment is found the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or endorsed thereon, before it is presented to the court; and if the indictment be for a misdemeanor only, and any witness has voluntarily appeared before the grand jury to complain of the defendant, his name must be marked as private prosecutor."

And Section 66-11-1, ACLA 1949, which reads as follows:

> "The indictment *must* be set aside by the court, upon the motion of the defendant, in either of the following cases:
>
> * * *
>
> "Second. *When the names of the witnesses examined before the grand jury are not inserted*

at the foot of the indictment or endorsed thereon."
(Emphasis supplied.)

STATEMENT OF THE CASE.

There can be very little dispute between the parties as to the facts relative to this petition.

Petitioner was indicted on October 28, 1957, in the District Court for the Territory of Alaska, First Division, at Ketchikan, the indictment charging him with a violation of the Territorial law against bribery.

The names of the witnesses appearing before the grand jury were neither inserted at the foot of the indictment, nor endorsed thereon.

Accordingly, the defendant moved to dismiss because of the failure of the grand jury to follow the provisions of the mandatory Alaska statute. The motion was proper and timely made; it was, nevertheless, denied.

The Court of Appeals, in reviewing the conviction, refused to consider the error committed by the trial court in requiring the petitioner to go to trial without having had the names of the witnesses supplied to him in accordance with law. The opinion of the Court of Appeals found that petitioner had failed to show that "this claimed error has been in any way prejudicial to him" and therefore held that the error, if any, was "harmless error to be disregarded."

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the failure of the trial court to dismiss the indictment was harmless error in the absence of a showing of prejudice to the petitioner.

2. In refusing to reverse the District Court.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals strikes down Alaska statutes of more than fifty years standing, and, if not reversed, deprives all persons accused of crime in Alaska of the benefit of these mandatory statutes granting them substantial procedural rights. That decision holds that prosecuting attorneys in Alaska may conceal from persons accused of crime the names of their accusers and the witnesses who have testified against them, although the law requires that these facts be revealed. It reaches that result by a refusal to recognize that these Alaska statutes are mandatory, and in disregard of legal principles hitherto generally accepted. The decision below is in conflict with the rulings of at least eight State Supreme Courts, is in substantial conflict with other decisions of the Court of Appeals itself, and would seem to be in conflict with the decision of this court in *Logan v. U. S.* (1892), 144 U.S. 263.

This whole problem arose out of an unfortunate dictum appearing in a footnote in the decision of the Court of Appeals for the Ninth Circuit in *Soper v.*

U. S. (C.A. 9th, 1955), 220 F. 2d 158. In that footnote, the court indicated that the statutes cited above "became inoperative" or had been abrogated by the application of the Federal Rules of Criminal Procedure in Alaska. This dictum was based on no authority, and was not required by the facts of the case, and was erroneous. The Federal Rules of Criminal Procedure did not repeal all provisions of the Alaska Code of Criminal Procedure, but only those provisions of the Alaska Code which were either inconsistent or in conflict with the Federal Rules. There is no conflict, nor inconsistency, between Rule 7(c) of the Federal Rules, prescribing the contents of indictments, and the provisions of these Alaska statutes requiring the names of witnesses to be endorsed thereon. These Alaska statutes do not prescribe the contents of an indictment or govern the rules of pleading in criminal cases. They simply require that when an indictment is found, the names of witnesses examined before the grand jury must be inserted at the foot of the indictment, or endorsed thereon. On the other hand, Rule 7(c) is a rule of pleading, describing the allegations and contents of the indictment.

The Court of Appeals for the Ninth Circuit had previously recognized that certain other Alaska statutes governing criminal procedure had not been repealed by the adoption of the Federal Rules of Criminal Procedure. *Stephenson v. U. S.* (C.A. 9th, 1954), 211 F. 2d 702.

The statute requiring the names of witnesses to be endorsed on the indictment is a substantial right of

the defendant; it is a mandatory condition precedent to prosecution; it is not a mere "matter of form".

Whether a law is directory or mandatory is usually determined by reference to its language, always with the design of effectuating the expressed legislative intent. Violation of a directory or permissive statute is normally attended with no serious consequences, while the failure to comply with the requirements of a mandatory statute either invalidates the purported transaction or subjects the non-complier to affirmative legal liabilities. See Sutherland *Statutory Construction* (3rd Ed.), Section 2801.

As this court noted in *Escoe v. Zerbst*, 1935, 295 U.S. 490, "Statutes are not directory when to put them in that category would result in serious impairment of a public or private interest that they were intended to protect." (p. 494.)

What are the "public or private interests" afforded protection by a statute requiring the endorsement of witnesses on an indictment? In *State v. Stevens* (S.D. 1891), 47 N.W. 546 (interpreting an identical statute) the South Dakota court said:

> "It must be presumed that this requirement was made for some just and wise purpose. No doubt the object was for the benefit of the accused: to give him the opportunity of knowing who were his accusers, and by whom the state expected to establish the charge preferred, in order that he might be the better prepared to meet it. To protect the innocent, and punish the guilty, are the two great objects to be kept in view in the administration of criminal jurisprudence. . . . A

> person indicted would be put to great disadvantage and hazard when called upon to answer if he were ready for trial, if he was in ignorance of the information as required by this statute. On the other hand, it is for the benefit of the state that the requirement of this statute should be enforced. . . . The statute is a command, coupled with a penalty." (pp. 546-7.)

Other state Supreme Courts have, quite uniformly, held identical statutes to be mandatory and binding according to their terms; they have not required, where timely objection has been made, any showing of "prejudice" in order for the defendant to be entitled to the protection of the law. *Andrews v. People* (Ill. 1886), 7 N.E. 265; *Merris v. Commonwealth* (Ky. 1941), 151 S.W. 2d 1030; *People v. Price* (Mich. 1889), 41 N.W. 853; *State v. Rickmire* (Minn. 1919), 174 N.W. 529; *State v. Porter* (Mont. 1950), 220 P. 2d 1035; *Cook v. State* (Okla. 1911), 120 Pac. 1038; *State v. Andrew* (Ore. 1899), 58 Pac. 786.

The opinion of the Montana Supreme Court in *State v. Porter*, supra, contains an excellent historical analysis of the development of these witness statutes, and a fine summary of the public interests they are intended to promote: (1) to discourage "secret inquisitions"; (2) to protect the State against the cost of frivolous or malicious prosecutions; (3) to enable the person accused to know the witnesses against him and for an opportunity to investigate them; (4) to effectuate the constitutional safeguards entitling the accused to be confronted with his accusers; and (5) to avoid surprise. Said the Montana Court:

"Concealing the identity of witnesses whose names are required to be revealed to the accused is a return to medievalism and completely foreign to our modern enlightened concepts of justice. . . . The very fact that the witnesses appeared either voluntarily or by subpoena and were present before the Grand Jury, indicates that their names were known. In such circumstances it is inexcusable for the state to conceal these witnesses from the accused. The statute requires that their names be endorsed. The history of criminal procedure demonstrates the sound reasons why the accused is entitled to this information. It is a fundamental right of the accused and depriving him of that right is depriving him of a fair trial." (p. 1050.)

This court has had occasion to consider a very similar statute. Section 3422, U.S.C., reads as follows:

"A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each veniremen and witness."

Considering this statute in *Logan v. U. S.* (1892), 144 U.S. 263, this court said:

"The words of the existing statute are too plain to be misunderstood. The defendant, if indicted for treason, is to have delivered to him three days before the trial a copy of the indictment, and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment;

> . . . The list of witnesses to be required to be handed to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of 'witnesses to be produced on the trial for proving the indictment'. The provision is not directory only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare a defense. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonally does so, the trial cannot lawfully proceed until the requirement has been complied with." (p. 304, emp. sup.)

The decision of the court below, holding that a deliberate violation of this statute is "only a matter of form" in the absence of a showing of "prejudice" deprives the defendant of a substantial procedural right and, in this case, deprived the petitioner of due process of law.

No showing of prejudice should be required; such a violation of the law imputes prejudice per se. To require the defendant to show prejudice before an indictment will be dismissed for failure to endorse the names of the witnesses, places an unreasonable and impossible burden upon him, and violates the important policy considerations upon which such statutes are based.

First, an indictment based solely upon hearsay evidence would be void, but if the Grand Jury is allowed to ignore the statute and return an indictment barren

of witnesses, there is no possible way for the defendant to establish that the indictment was unlawfully found.

Second, if secret inquisitions and frivolous or malicious prosecutions are to be discouraged, the state must obey the law. If secrecy concerning the witnesses is maintained, in spite of the mandate of the law, these policy considerations are out the window, and carte blanche is extended to the slanderer and the personal enemy.

Third, these statutes are intended to enable the defendant to prepare to meet the testimony of particular witnesses, to investigate the background and antecedents of such witnesses, and to obtain material for impeachment, if any such material be available. Of course, if the law can be violated with impunity, and no witnesses need be shown, no such preparation is possible. What would it avail the defendant to run around investigating witnesses *after* the trial is over? The plain fact is, that the decision of the court below means the complete destruction of these statutes. This is to be regretted, as it tends to preserve the old idea of a criminal trial as a battle of wits and a sporting contest. The correction of this error is sufficiently important to indicate review by this court.

CONCLUSION.

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Dated, Anchorage, Alaska,
December 4, 1959.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Petitioner.

WENDELL P. KAY,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit.

EDWARD LEWIS SHORT, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15,954 Oct. 2, 1959

Appeal from the District Court for the Territory (now State) of Alaska, Division Number One

Before: HAMLEY, HAMLIN and JERTBERG, Circuit Judges

JERTBERG, Circuit Judge.

Appellant, after trial by jury in the district court for the Territory (now State) of Alaska, at Ketchikan, was convicted on the charge of bribery and sentenced to five years imprisonment, four and a half years of which were suspended with the provision that the suspended period be spent on probation. Final judgment having been rendered December 12, 1957, before Alaska became a State by virtue of the President's Proclamation of January 3, 1959, this Court has appellate jurisdiction under 28 U.S.C. §§ 1291, 1294. See *Parker v. McCarrey*, #16499, June 6, 1959, 9 Circuit, 268 F. 2d 907.

The bribery, a violation of the territorial law, §65-7-4, A.C.L.A. 1949, arose in the course of a police investigation into an attempt to open the city of Ketchikan to certain unlawful activities, such as gambling and prostitution. Edward Bolton, who had lived in Ketchikan for about six years and was a bartender at a local hotel, discussed several times the possibility of "opening up" the city with Walter O. Smith, a patrolman of the Ketchikan Police Department. Smith testified that Bolton finally told him that he had arranged to have a girl come to Ketchikan and Bolton requested Smith to contact the chief of police to see if an arrangement could be made to work the girl without police interference; that Smith reported the incident to the chief of police, who in turn informed the assistant United States attorney; that Smith was ordered to continue to investigate the case and in doing so he continued to meet with Bolton; that Bolton then indicated to him that the appellant, who was the co-owner of the Pioneer Bar and Liquor Store in Ketchikan, wanted to talk with him about opening up a gambling game in the back of his bar; that after Bolton repeated the request several times to see the appellant, the assistant United States attorney instructed Smith to do so; that after making sure that appellant would be in the bar Smith entered in plain clothes, sat down at the far end of the bar from the door, where he engaged on and off in a general conversation with appellant for about 45 minutes, and as he got up to leave appellant said, "Don't run off, Smitty. I want to talk to you a minute"; that with this he sat down again and appellant said, "I understand that the

town is going to open up" and that he would like to open up a "two-and four" game in back, and wanted to know how much it would cost; that Smith told appellant he didn't know, but asked what appellant thought was fair, and appellant replied that they usually paid ten or fifteen per cent, and Smith told appellant he would have to talk it over with the chief, which he did; that it was decided a counter-offer should be made immediately, and it was written out on a scratch pad, "$100 a week or 10 per cent, whichever is most—*now*."; that with the note Smith returned to the appellant's bar and told him what the chief wanted and handed him the note; that after checking with his partner appellant told Smith it was "O.K."; that after a drink Smith told the appellant's partner he was going out into the restroom where appellant joined him and handed him five $20 bills; that Smith reported the payoff to the assistant United States attorney and to the chief of police. The bills were introduced in evidence during the trial.

The chief of police testified that before his patrolman Smith returned to the appellant's bar with the counter-offer written on the note, he told Smith that because the other bribery cases, including the one involving appellant's contact Bolton, were about to be broken, with arrests to be made that night, Smith would have to get a payment of some kind from appellant before appellant was tipped off by the arrest of the others.

Appellant's testimony about the happenings in his bar was to the effect that while he did have conversa-

tions there with Smith concerning gambling, his partner had joined the conversations and that they had rejected the offer that Smith brought back from the chief of police. This testimony of the appellant was corroborated by his partner, although a government witness, a territorial policeman, testified he was in the bar when the patrolman Smith first talked with the appellant and that he did not observe that appellant's partner was then in the bar.

Appellant's only other witnesses were a vice-president of a local bank and two local businessmen who testified that appellant's reputation in the community for integrity and honesty was good—testimony which was not contradicted.

In this appeal, appellant makes four contentions:

1. That contrary to Alaska territorial law, the names of the witnesses examined before the grand jury were not inserted at the foot of the indictment or endorsed thereon;

2. That without being informed of his privilege against self-incrimination he was required to appear before a grand jury and give testimony concerning the case for which he was already under indictment, thereby impairing his constitutional rights;

3. That the allowance of government police reports into evidence after their use for impeachment purposes, the deletion of portions of the report to prevent examination by defense counsel and certain limitations placed on defense witnesses' testimony and the scope of cross-examination of government witnesses constituted error; and

4. That without any basis in the evidence, the court instructed the jury to treat with caution and weigh with great care all evidence relating to any admissions or incriminating statements claimed to have been made by the defendant outside of court.

Appellant's first contention concerning the government's failure to insert at the foot of the indictment or by endorsement the names of the witnesses examined before the grand jury while considering appellant's indictment raises a question which this Court has already considered. In *Soper v. United States*, (1955) 9 Cir., 220 F. 2d 158, only two of the many witnesses appearing before the grand jury were endorsed on the indictment. Soper waived his objection, however, by failing to make a timely motion to dismiss the indictment before the trial commenced. Even so, the Court by footnote indicated the provisions of Alaska territorial law requiring the indictment to include the witnesses' names became inoperative upon adoption of the Federal Rules of Criminal Procedure, id., Note 2, page 159. Appellant strongly urges that the conclusion is erroneous, claiming that the Federal Rules of Criminal Procedure were not intended to repeal existing territorial legislation which was not inconsistent. However, we need not reach this question. Appellant has failed to show that this claimed error has been in any way prejudicial to him. As such, if there is error, it could be no more than harmless error to be disregarded under Rule 52(a) of the Federal Rules of Criminal Procedure, 18 U.S.C. This rule, and its predecessor, 18 U.S.C. 556, has been con-

sistently construed to prevent errors in matters of form from invalidating an otherwise valid indictment so long as the error is not prejudicial, and the indictment charges the offense in such a way as to fully inform the defendant of the violation of law, and in case of a conviction or acquittal to prevent the same defendant from being retried for the same offense. *Hagner v. United States*, (1932), 285 U.S. 425, 431-433; *Hopper v. United States*, (1944), 9 Cir., 142 F. 2d 181, 184-185; *Fisher v. United States*, (1956), 9 Cir., 231 F. 2d 99, 102. Without some showing of prejudice, we hold that appellant's objection is only to a matter of form.

The appellant's second contention that his constitutional rights were violated by testifying before the grand jury without being advised of his constitutional rights can be disposed of in the same manner. Again, there is no showing there was any prejudicial effect even if appellant's rights had been violated. None of the testimony given before the grand jury was used in appellant's trial, nor is there any indication that the testimony led to other evidence that was used against him. Appellant was not under subpoena to appear before the grand jury, but had only been "invited" to do so. There was testimony that he said he had consulted with his legal counsel before his appearance, and there was testimony by the grand jurors that after appellant had testified concerning the events surrounding the bribery and had voluntarily shown a photograph of the note setting forth the police "counter-offer" to the members of the grand jury.

he refused to give any further information concerning his charge in the presence of the United States attorney. In the absence of the United States attorney, appellant gave only general information without revealing anything further about the charge against him. This would seem to indicate that he knew his rights against self-incrimination. Appellant's counsel states he is unable to find any authority which holds that failure to inform a defendant of his rights against self-incrimination before testifying in a grand jury investigation invalidates a preexisting indictment. Possibly this is so because of the completely phantom-like character of appellant's contention, since appellant's testimony before the grand jury was never offered or received in evidence, and since appellant has failed utterly to show that he has in any manner suffered any prejudice.

We come now to the errors claimed to have been committed by the trial court in the admission and exclusion of evidence. During the cross-examination of patrolman Smith, counsel for appellant, as sanctioned by 18 U.S.C.A. § 3500, demanded copies of the police reports made by Smith. In accordance with subsection (c) of this section, the government delivered the reports to the court for inspection en camera. The court deleted those portions which in its opinion did not relate to the subject matter of the testimony of the witness. The deletions were made by photostating the reports with the deleted portions covered. The entire text of each report has been preserved and appellant requests that this Court determine "the correctness of

the ruling of the trial judge" in making the deletions. In accordance with this request, and pursuant to the provisions of said sub-section, we have read all the deleted portions of the reports and find no error in the trial court's excisions.

On cross-examination of patrolman Smith appellant's counsel used and read into the record extracts from some of these daily reports. Some of these extracts were used to question Smith about the practice of searching a policeman before he was to receive a payoff; whether he used a pocket recording machine in the course of conversations during the investigation; the circumstances surrounding and the terms of the alleged payoff by appellant; the witness' conversation with Bolton relating to the amount Bolton was to pay to allow the prostitute Fay Hodge to operate; whether the initial payoff by Bolton was to be $100, $200 or $300; the threats and warnings to Bolton by the witness in order to secure the payoff from Bolton; and questions concerning a loan which Bolton stated had been made to him by the appellant. The extracts of the reports regarding the transactions between the witness and Bolton did not include any references to the appellant except so far as they revealed that Bolton told him the witness had borrowed money from appellant. The alleged loan, however, was in no way tied in with Bolton's illegal activities.

Apparently counsel for the government concluded that since the extracts of conversations with Bolton did not refer to the appellant, except in respect to the loan above mentioned, that the purpose of the cross

examination was to show inconsistencies between the witness' testimony on direct examination and the extracts used on cross-examination, and thereby cast suspicion on the credibility of the witness. Therefore, on redirect examination counsel for the government started to read to the jury all of the witness' daily reports made during the period of the investigation and leading up to the appellant's arrest. Without objection by appellant's counsel, counsel for the government read into the record complete reports of the activities of the witness covering a period of several days. These reports related to the unlawful activities of persons who do not figure in any way in the charges against appellant. These reports relate to Bolton, and a person named "Booger Red" who planned to bring two women to Ketchikan for the purpose of prostitution; that one of the women, Fay Hodge, had arrived; that the witness had negotiated with Bolton and Fay Hodge concerning the amount of payoff to permit her to operate; that they considered bringing Fay's sister to Ketchikan from Seattle and that Fay Hodge had returned to Seattle to get her sister and possibly "make some kind of dope deal here in town"; that a cab driver was in the deal by transporting customers to the prostitutes; and that illicit liquor transactions would be carried on. The reports read cover approximately ten pages in the transcript. During the reading of such reports appellant's counsel made only one objection, and that objection was based on the leading nature of a question by government counsel. Finally appellant's counsel inquired of the United States Attorney if he intended to read all of

these reports all the way through. Government counsel indicated that he had a right to do so. At this point, however, counsel for the appellant then for the first time objected to the reading of the entire reports on the ground that 18 U.S.C.A. § 3500 did not contemplate such procedure, and on the further ground that the reports contained rumor, gossip and hearsay and other incompetent and irrelevant matters. Thereupon the trial court stated that counsel for the government would be permitted to read only the individual daily reports extracts of which had been used by appellant's counsel in his cross-examination of Smith. Following the ruling of the court, government counsel read into the record only those daily reports of the witness extracts of which had been used or referred to by appellant's counsel in his cross-examination of the witness.

Appellant contends that the ruling of the court constituted prejudicial error. Appellant also contends that the error of the court was compounded by the court's failure to instruct the jury that the complete reports were to be considered by it not as evidence in support of the charges against appellant but for such bearing as they might have on the weight to be given to the testimony of patrolman Smith. Admittedly, appellant made no such request of the court at any time before or after the reports were read, nor did appellant's counsel request that such instruction be read as a part of the court's instructions to the jury.

We are unable to see how appellant can claim prejudicial error based upon the daily reports which were

read by government counsel prior to any objection on the part of appellant. Appellant's counsel sat silent while reports covering ten pages of transcript were read to the jury. We concede that in large portion the reports were incompetent, irrelevant and immaterial, and no doubt would have been excluded if appellant's counsel had objected, or would have been stricken from the record on motion of the appellant. We assume that appellant's counsel did neither under his belief at that time that the subject matter of the reports would be more helpful than harmful to appellant's case. Furthermore, some portions of such reports were properly received under the doctrine of testimonial completeness which permits the introduction into evidence of an entire statement when only a portion of it has been used by an opponent. This affords the trier of fact a complete understanding of the total tenor and effect of the statement in its proper context. See 7 Wigmore on Evidence, § 2113. In the instant case the extracts of the reports used by appellant's counsel on cross-examination of Smith were used in the main to impair and undermine the credibility of Smith in the eyes of the jury. Under such circumstances it was within the sound discretion of the trial court to permit relevant portions of the remainder of the reports to go to the jury for the limited purpose of reestablishing the witness credibility. *Affronti v. United States*, (1944), 8 Cir., 145 F. 2d 3, 8; *Jones v. United States*, (1908), 9 Cir., 162 F. 417, 432. Appellant's counsel had ample opportunity to examine these reports prior to their being read into the record and should have called the attention of

the court to any portions which he considered to be irrelevant to the limited use for which they were being read.

In respect to reports read into the record by government counsel after appellant's objection, we have already noted that the trial court permitted government counsel to read only those reports extracts of which had been used by appellant's counsel in his cross-examination of Smith. While it would have been better practice for the trial court to have limited the reading of such reports on the basis of relevancy rather than the arbitrary method of allowing the complete daily report so long as the appellant used some part of the report for the day involved, counsel for appellant has failed to point out any irrelevant portion read to the jury which constitutes prejudicial error. This is particularly true in view of the irrelevant and incompetent portions of the reports which appellant's counsel permitted government counsel to read into the record without objection. Furthermore, it was made clear to the jury by appellant's counsel that the portions of the reports which were read by government counsel concerning the unlawful activities of Bolton and other persons did not constitute substantive evidence against the appellant. This is made clear by the recross-examination of the witness by appellant's counsel, wherein the following questions and answers appear:

> "Q. [Appellant's counsel] Now, the material in these reports relating to Bolton and these other people that you have mentioned had nothing what-

ever to do with Ed Short, the defendant in this case; is that correct?

"A. [Witness Smith] How is that, sir?

"Q. The portions of these reports which have been read by Mr. Connor [United States Attorney] relating to Eddie Bolton and Fay Hodge and other people named had nothing whatever to do with the defendant in this trial, Ed Short; is that correct?

"A. Portions of them had nothing to do with Mr. Short; no, sir.

"Q. The only thing that had any connection between Mr. Short and Mr. Bolton, to your knowledge, was that Ed Bolton borrowed some money from Ed Short; isn't that correct?

"A. That is what he stated; yes, sir."

While we recognize that the doctrine of testimonial completeness must be carefully applied by the trial court, we are unable to agree with appellant's counsel that in the circumstances of this case appellant suffered any prejudice by the rulings of the trial court on this subject.

Appellant also complains that the trial court erred in refusing to permit cross-examination of the police chief, T. H. Miller, concerning charges by Bolton that the police chief was the instigator of the idea of opening the town up, and in refusing to permit one Harold E. Smith, produced by the defense, to testify as to conversations with the patrolman, Walter O. Smith. However, in his argument appellant has failed to show how the denial of this right of cross-examination and the use of a further witness in any way prejudiced the appellant's rights.

Appellant's final contention is that the court erred in instructing the jury as follows: "All evidence relating to any admission or incriminatory statement claimed to have been made by a defendant outside of court should be considered with caution and weighed with great care." Appellant claims that there was no evidence to indicate that the defendant had made any such admission or incriminatory statement and that the effect of giving such an instruction could only be harmful to the rights of the accused. With this we cannot agree. The record reveals that two witnesses, Bolton and patrolman Smith, both testified to what could be interpreted as admissions or incriminatory statements of the appellant.[1] Under the circum-

[1] These statements appear in Edward Clifford Bolton's testimony:

"Q And what did he say?

A He just nodded and said that he may be interested in opening up a 'two and four'.

Q A 'two and four?'

A Yes.

Q And then what else happened on that occasion?

A He just told me to send the man around. • • •

Q Then Mr. Short replied, and isn't this correct, 'Well, if you want to send them over, or send him over, or send them over, I will talk with them. I might be interested in a "two and four" game,' or words to that effect?

A Words to that effect; yes."

Walter O. Smith's testimony includes these statements:

"Q Well, then you say you were getting up to leave, and what happened then?

A Mr. Short made the remark, he said, 'Don't run off I would like to talk to you,' or, 'I want to talk to you for a minute,' so I sat back down, and he said, 'I would like to open up a "two and four" game in the back.'

Q What did you say?

A And so I told him that might be possible, and he made the remark, 'I had heard the town was going to be opened up,' and he wanted to know what it would cost • • •

Q So, when you went back to the bar with this note, tell us what happened then?

stances, it is clear that this instruction which, if anything, is favorable to the appellant is clearly called for by the evidence in the record.

Finding no prejudicial errors, the judgment of the trial court is affirmed.

(Endorsed:) Opinion. Filed Oct. 2, 1959.
Paul P. O'Brien, Clerk.

A I went back and, as I say, I explained to Mr. Short the conversation that I had had with the Chief, and he said, 'Well, I want to talk it over with my partner a minute,' so he went out the front of the bar and he was gone approximately four or five minutes, and he came back and he said, 'It is O.K. with my partner' • • •

A • • • when I was in the washroom Mr. Short came in and he handed *me* five twenty dollar bills, and he said this one hundred dollars was to apply on the first week after District Court closes."

United States Court of Appeals for the Ninth Circuit.

EDWARD LEWIS SHORT, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15,954

JUDGMENT

Appeal from the District Court for the Territory (now State) of Alaska, First Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered: October 2, 1959.

Paul P. O'Brien, Clerk.

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No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1959

EDWARD LEWIS SHORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. Vol. III, 334-343) is reported at 271 F. 2d 73.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1959 (R. Vol. III, 344). A petition for rehearing was denied on November 13, 1959 (R. Vol. III, 345). The petition for a writ of certiorari was filed on December 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly denied petitioner's motion to dismiss the indictment, grounded on the contention that it was defective under Alaska Territorial law because it did not contain the names of the witnesses examined by the grand jury.

STATUTES AND RULE INVOLVED

The pertinent statutes and rule provide as follows:

Section 66-8-52, Alaska Compiled Laws Ann. (1949):

> That when an indictment is found the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court; and if the indictment be for a misdemeanor only, and any witness has voluntarily appeared before the grand jury to complain of the defendant, his name must be marked as private prosecutor.

Section 66-11-1, Alaska Compiled Laws Ann. (1949):

> The indictment must be set aside by the court, upon the motion of the defendant, in either of the following cases:
>
> * * * * *
>
> Second. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon.

Rule 7(c), Federal Rules of Criminal Procedure:

> The indictment or the information shall be a plain, concise and definite written statement of

the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. * * *.

STATEMENT

The grand jury for the District Court for the Territory of Alaska returned an indictment in October 1957 which charged petitioner with bribing Walter O. Smith and T. H. Miller (the latter the Chief of Police of the City of Ketchikan) to prevent their interfering with petitioner's gambling activities, in violation of Section 65-7-4, Alaska Compiled Laws Ann. (1949) (R. Vol. I, 3-4). The indictment did not set out the names of the witnesses who appeared before the grand jury which returned the indictment. Following a trial by jury, petitioner was convicted (R. Vol. I, 4) and sentenced to a term of 5 years. Four years and six months of that sentence were suspended and petitioner was placed on probation during that period (R. Vol. I, 5-7).

ARGUMENT

Petitioner's sole contention is that his conviction should have been reversed because the indictment failed to contain the names of witnesses as required by the Alaska Compiled Laws 66-8-52. The Court of Appeals for the Ninth Circuit indicated, in a prior case, that this provision was abrogated when the Rules of Criminal Procedure were made applicable to the Alaskan courts. *Soper* v. *United States*, 220 F. 2d 158, 159, fn. 2; certiorari denied,

350 U.S. 828.[1] It refused to reconsider that ruling here, noting that in all events petitioner had not been prejudiced by the lack of endorsement of the names of witnesses.

The question has no future significance in view of Alaskan statehood. The prior conclusion of the court below—that the provision for the names of the witnesses is inconsistent with the requirement of Rule 7 (c) that the indictment or information shall be "a plain, concise and definite written statement of the essential facts constituting the offense charged" —is, at the least, a reasonable one.[2] There is no occasion for further review by this Court.

---

[1] As the court below noted at the outset of its opinion, there was not question as to its appellate jurisdiction, the district court's judgment having been rendered prior to Alaskan statehood.

[2] Petitioner's citation of numerous state cases which have held that statutes identical to the Alaska statutes involved here are mandatory are inapposite since they involve no question of overriding Federal rules.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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JANUARY 1960

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